IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 9, 2009 Session

FRANCES HALL v. THE TOWN OF ASHLAND CITY

Appeal from the Circuit Court for Cheatham County
No. 5720 Larry J. Wallace, Judge

No. M2008-01504-COA-R3-CV - Filed February 12, 2009

Defendant's rescue vehicle crashed into plaintiff's car at a busy intersection. The trial court found both parties negligent, with the speed of the rescue vehicle being the overriding factor. Defendant was found responsible for 60 percent of the fault and plaintiff for 40 percent of the fault. Damages were allocated accordingly. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

Robert M. Burns and Timothy Phillip Harlan, Nashville, Tennessee, for the appellant, The Town of Ashland City.

William C. Moody, Charlnette Anastasia Richard, and Dale M. Quillen, Nashville, Tennessee, for the appellee, Frances Hall.

OPINION

On the afternoon of October 30, 2005, an Ashland City Fire Department rescue vehicle was dispatched on a call regarding an individual having a possible heart attack. The vehicle, driven by firefighter Joshua Jackson, was lime green in color and was about thirty feet long, eight feet wide and eleven feet tall. Also riding in the vehicle were Kristopher Greer, Allen Nicholson, and Thomas Royal. The vehicle was equipped with emergency lights, sirens and air horns, all of which were in continuous operation from the time the vehicle left the firehouse. They proceeded south on Highway 12.

At the same time, Francis Hall, an 80-year-old elementary school teacher, had just finished shopping at the Wal-Mart shopping center located at 1626 Highway 12 South, Ashland City. Preparing to exit, she was second in line, behind a red pickup truck, at the stop light at the shopping center exit onto Highway 12. She intended to turn left and proceed northward along Highway 12.

As the rescue vehicle proceeded southward down a straight section of Highway 12, lights flashing and sirens blaring, it approached the stop light at the Wal-Mart shopping center. Jackson took his foot off the accelerator. This action engaged an engine brake which decreased the vehicle's speed. The red pickup truck ahead of Hall "darted" into the intersection. Jackson applied the brake, slowing the rescue vehicle further. The pickup truck cleared the intersection and Jackson proceeded on. Unfortunately, Hall then entered the intersection. She was looking straight ahead. Jackson swerved left attempting to avoid her but could not. The front corner of the bumper on the passenger side of the rescue vehicle collided with the left front portion of Hall's Toyota Camry.

Hall suffered a subarachnoid hemorrhage,[1] a scalp laceration, a skull fracture and a contusion to the right lobe of her brain. She also broke her collarbone. In addition, Hall's left eardrum was ruptured, and she had left-sided facial weakness and significant bruising on all her extremities. She was hospitalized for four days and resided in a rehabilitation facility for 15 days. She missed 48 days of work. At the time of trial, Hall still suffered with short-term memory losses, problems with thinking skills, balance problems and tiring easily. Fortunately, she recovered sufficiently to resume teaching until she retired just before the trial.

Hall sued the Town of Ashland City under the Governmental Tort Liability Act, Tenn. Code Ann. § 29-20-101 *et seq.* The facts previously described are basically uncontroverted. The trial centered on whether Jackson, the rescue vehicle driver, was negligent by traveling too fast through the intersection and whether Hall was negligent (and, if so, to what degree). The trial court ruled that both parties were negligent, the town's comparative negligence being 60 percent and Hall's being 40 percent, and awarded Hall $233,620.00 for bodily injury and $12,177.00 for property damage. Ashland City appealed, maintaining that the trial court erred in determining that Francis Hall was only 40 percent comparatively at fault based upon the evidence.

The percentage of a party's fault is a question of fact. *Cross v. City of Memphis*, 20 S.W.3d 642, 644 (Tenn. 2000); *Varner v. Perryman*, 969 S.W.2d 410, 411 (Tenn. Ct. App. 1997). The standard of review of the trial court's findings of fact is de novo upon the record with a presumption of correctness unless the evidence preponderates to the contrary. Tenn. R. Civ. P. 13(d).

A negligence claim requires the following elements: "(1) a duty of care owed by the defendant to the plaintiff; (2) conduct falling below the applicable standard of care amounting to a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate, or legal cause." *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993). Ashland City maintains that Tenn. Code Ann. § 55-8-108 establishes the duty the city owed to Hall and that the duty was met.

[1] According to Dr. Thomas Groomes' deposition, a subarachnoid hemorrhage is bleeding beneath a layer of tissue that covers the brain.

Tenn. Code Ann. § 55-8-108 states in pertinent part:

> (a) The driver of an authorized emergency vehicle, when responding to an emergency call, or when in the pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions stated in this section.
>
> (b)(1) A driver of an authorized emergency vehicle operating the vehicle in accordance with subsection (a) may:
> . . .
>
> (B) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;
>
> (C) Exceed the speed limits so long as life or property is not thereby endangered;
> . . .
>
> (2) Subdivision (b)(1) shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall subdivision (b)(1) protect the driver from the consequences of the driver's own reckless disregard for the safety of others.
>
> (c)(1) The exemptions granted under subsection (b) to a driver of an authorized emergency vehicle shall only apply when the vehicle is making use of audible and visual signals meeting the requirements of the applicable laws of this state, except that while parked or standing, an authorized emergency vehicle shall only be required to make use of visual signals meeting the requirements of the applicable laws of this state.

The town maintains that Jackson's actions in braking and slowing the vehicle show that he drove "with due regard for the safety of all persons." Tenn. Code Ann. § 55-8-108(b)(2). Jackson testified that he considered the Wal-Mart intersection dangerous and that he was taught to expect that motorists might not see his vehicle. He did not know the speed of the rescue vehicle when it went through the intersection. Allen Nicholson, who was riding in the front passenger's seat of the rescue vehicle, testified that he glanced at the speedometer and their speed was 35 to 45 miles per hour when the accident occurred. Nicholson's testimony is consistent with that of Todd Hutchinson, Hall's accident reconstruction expert, who testified that at the point of impact the rescue vehicle "had reduced speed to between 35 and 46 [miles per hour]."

Is going 35 to 45 miles per hour through an intersection the driver knew was dangerous consistent with the duty to drive "with due regard for the safety of all others," as required by Tenn. Code Ann. § 55-8-108? Robert Krause, an expert witness called by Hall, thought Jackson should have acted differently. Krause, a firefighter and paramedic, trained firefighters and paramedics in Toledo, Ohio and was an instructor in emergency vehicle operations. After a review of the re-

enactment DVDs, witness statements, the Tennessee Highway Patrol Critical Incident Report, the Ashland City Police Report, the report of the accident reconstruction expert, the depositions and court filings, Krause opined that "upon approaching an intersection such as this, the vehicle should have been brought to a stop or near stop." He further stated the emergency vehicle drivers are

> taught to expect the unexpected. That the motoring public may not see them. They may not hear them. They may completely disregard their very presence. We're taught to expect the unexpected. That despite the proper use of lights and sirens, that it is possible that they don't hear you or see you.
> . . .
>
> So you have to afford the motoring public the opportunity to motor out of your way . . . Slowing the vehicle down – certainly you want to traverse that intersection safely. If it means bringing it to a complete stop, then that's what has to be done. But slowing it down so that you allow the motoring public to, A, recognize that you're there or react to the fact that you're there and to provide them an option, an out on where to move so they can get out of your way.

The trial court found Jackson, and therefore Ashland City, to have been negligent. The evidence does not preponderate otherwise. We affirm the trial court's finding of negligence.

Ashland City also argues that Hall was at least as negligent as Jackson. The town cites Tenn. Code Ann. § 55-8-132(a)(1):

> (a) Upon the immediate approach of an authorized emergency vehicle making use of audible and visual signals meeting the requirements of the applicable laws of this state, or of a police vehicle properly and lawfully making use of an audible signal only:
>
> (1) The driver of every other vehicle shall yield the right-of-way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the roadway clear of any intersection, and shall stop and remain in that position until the authorized emergency vehicle has passed, except when otherwise directed by a police officer . . . .

Hall obviously did not comply with this statute. Her brief on appeal offers an interesting defense of her action:

> The plaintiff concedes that there is ample evidence upon which the trial court could base its finding that the plaintiff should have seen or heard the rescue truck approaching. However, the only possible inference to be drawn from the facts is that she did not. This inference is supported by two presumptions. The first is that 80-year old school teachers don't try to "beat" fire engines. The second is the amnesiac

> presumption. An amnesiac, or a plaintiff, who due to his or her injury has no memory of an accident, is afforded the presumption that he or she acted with due care. *Jeffreys v. Louisville & N.R. Co., Inc.*, 560 S.W.2d 920, 921 (Tenn. Ct. App. 1977).

We disagree with the plaintiff's reasoning. First, one might think that 80-year-old women do not engage in risky behavior — after all, that may be how they reach the stage of being 80-year-old women. We are not inclined, however, to think this possibility rises to the level of a legal presumption. Second, the "amnesiac presumption" exists "only in the absence of evidence to the contrary." *Jeffreys,* 560 S.W.2d at 921. Since Hall concedes that "there is ample evidence upon which the trial court could base its finding that the plaintiff should have seen or heard the rescue truck approaching," the "amnesiac presumption" is defeated.[2] We affirm the trial court's finding that Hall was negligent.

The trial court found "that the overriding factor in this case, in the accident, was the speed of the rescue truck, and the Court puts a great amount of weight on that factor." The court also attached significant weight to the red pickup truck going through the intersection before Hall. "[T]he red truck coming out in front of the rescue truck should have put the driver on notice to slow down any further than he did . . . It is the Court's belief that he should have been going at a much slower speed." Although the trial court found Hall was also negligent, the court considered all the factors, exhibits and arguments of counsel and determined that Jackson was 60 percent responsible for the accident and Hall responsible for 40 percent. Since we do not find that the evidence preponderates otherwise, we affirm the trial court.

Costs of appeal are assessed against the Town of Ashland City, for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE

[2]Even if this concession had not been made, we would have found that there was sufficient evidence in the record to defeat the "amnesiac presumption."